IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32 (2)(b)

Description of the Case

Criminal Jail Appeal No. 337 of 2004

Date of decision :-03.03.2006

A.F.R. (Approved for Reporting)

~~Not Approved for reporting~~

Initial of Judge

Date :- 03.03.2006

Note: Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARANCHAL AT NAINITAL
Criminal Jail Appeal No. 337 of 2004

Babool S/o Khem Bahadur
R/o village Haripur
Navada Thana Clamantown
District Dehradun ….Appellant

Versus

State …….Respondent

Date:- 03rd March, 2006

Sri R. P. Nautiyal learned Amicus Curiae for the appellant.
Sri Sudhir Chaudhary learned A.G.A. for the State.

Hon'ble J.C.S. Rawat, J.

1) This is a criminal appeal against the judgment and order dated 28.7.2004 passed by Sri Udairaj, the then Addl. Sessions Judge, Dehradun in S.T. No.32/2004, whereby the appellant-Babool was convicted and sentenced to undergo R.I. for a period of then years and to pay fine of Rs. 2000/- under section 376 I.P.C. The appellant was also convicted and sentenced to undergo for a period of six months R.I. under section 323 I.P.C. Both the sentences would run concurrently. In default of payment of fine, the appellant to undergo for further two months R.I.

2) Brief facts of the case are that on 16.10.2003 a report was lodged by Rajendra Kaushal (maternal uncle of the prosecutrix) in the police station Jogiwala alleging therein that on 15.10.2003 at about 5:45 p.m. his niece aged about 8 years was going to fetch the milk from Munna Lal. When she reached near the house of Balam Singh, the appellant met her and took her to the fields, where he throttled her neck and tried to kill her. She became unconscious. When the prosecutrix did not come to her house a search was

made. On being made search, it was informed by Vimal that the prosecutrix was going with the appellant towards the jungle. The prosecutrix came to her hose at about 10p.m. and thereafter she weas taken to hospital where the medical was conducted. Meanwhile, a report was lodged under section 307 IPC. The prosecutrix was medically examined by Dr. Alka Punetha (PW3). The following injuries were found on the person of prosecutrix:-

(i) Abreted contusion 12cm x 7cm front of left side neck.

(ii) Abrasion multiple 6cm x 2cm on left side chick.

(iii) Abrasion on right side foot central aspe 3cm x 2cm.

(iv) No extornating around pubic region.

According to radiologist, the age of the girl was more than 7 years and less than 12 years at the time of incident. It was also mentioned that no opinion can be given about rape as hymen intact and vaginal smear is negative.

3) Thereafter, the police investigated the matter and submitted the chargesheet before the court under sections 307, 376 & 511 I.P.C.

4) The appellant was initially charged under sections 307, 376/511 I.P.C. by the trial court. The appellant denied the charges and claimed the trial. Later on, the evidence of PW1-prosecutrix was recorded and charge was modified by the trial court. The trial court framed the charge under section 376 IPC instead of section 376/511 IPC.

5) In order to prove its case, the prosecution has examined eight witnesses i.e. prosecutrix (PW-1), Rajendra Kaushal (PW-2), Dr. Alka Punetha (PW-3), Head Constable Kunwar nand (PW-4), Vimal Kumar (PW-5), S.I.-Ved Pal Tomar (PW-6), Dr. Viraj (PW-7), Constable Santan Singh (PW-8). Thereafter, the statement of the accused-appellant was recorded under section 313 Cr.P.C. Accused pleaded not guilty to the offence charged. He has denied the allegations and stated that on his pointing out the brother of Rajendra Kaushal was arrested in a murder case. He has also stated that on his behest Vimal Kumar was challaned in a case punishable under section 60 of the Excise Act. As such, he had been falsely implicated in this case.

6) On consideration of the entire evidence on record the learned Addl. Sessions Judge convicted the appellant and sentenced him as mentioned above.

7) Feeling aggrieved by the judgment and order of the Sessions Judge, the appellant has come up before this Court.

8) Heard Sri R.P. Nautiyal learned counsel for the appellant and Sri Sudhir Chaudhary learned A.G.A. and perused the record carefully.

9) The prosecution has adduced the evidence of prosecutrix as PW1. She narrated the different version from the FIR. She stated that she is a student of class IV in the Vivekanand college and she resides with her maternal uncle and aunts. On the date of incident, she was going to bring the milk from the shop of Munna Lal and when she reached near the house of Balam Singh the appellant met her and she was taken to jungle on the assurance that he would give her toffees. She was taken to the field in the jungle where her undergarment was put off and the appellant also put of his own

undergarment and committed the rape with her. When the appellant heard some noise, he took her some other place in the jungle and left the articles belonging to victim at the spot. The prosecutrix did not take her utensils of milk from the place of incident. Thereafter, the appellant abandoned her in the jungle. She reached on the road from the jungle and met two police personnel, who helped her and seated her on a vehicle-vikram, then she reached at her residence. She narrated the entire story to her maternal uncle and aunt. Rajendra Kaushal (PW2) has narrated the entire incident in support of the prosecution. He has further stated that the prosecutrix was raped by the appellant. The prosecutrix was medically examined and the utensil of milk and other articles were recovered from the spot and the recovery memo was prepared thereof. PW2 has supported the evidence of prosecutrix. Vimal Kumar (PW5) has stated in his evidence that he was carrying woods from the forest. When he reached near the house of Balam Singh he saw the prosecutrix going with the appellant towards the jungle. The prosecution has also adduced the medical evidence. Dr. Alka Punetha (PW3) had examined the prosecutrix on the next date of the incident i.e. 16.10.2003. It was mentioned in the medical report that no opinion can be given about rape as hymen was intact and vaginal smear in negative. Dr. Viraj (PW7) examined the prosecutrix on the date of incident and found four injuries on her person. The prosecution witness Dr. Punetha PW3 had specifically stated that there was no injury on the private part of the girl. PW2 stated in the cross examination that he never took the prosecutrix to the doctor on 16.10.2003 and the medical examination was not conducted. Though, this fact is against the

record. The prosecutrix was examined by Dr. Viraj prior to the second examination i.e. on 15.10.2003 in the night at about 11:15pm. It is also relevant that the report was lodged on 16.10.2003 at about 10am and the said medical report, which was conducted on 15.10.2003 at 11:15pm was not placed before the police. It is also pertinent to mention here that the prosecutrix was present at the time of lodging the report and when the entry was made in the G.D., the injuries would have been recorded in the said G.D. Dr Alka Punetha (PW3) had examined the prosecutrix on the next date of the incident i.e. 16.10.2003. It was mentioned in the medical report that no opinion can be given about rape as hymen was intact and vaginal smear was negative. If the injuries would have been made on the private parts of the prosecutrix on the date of incident, it could had been noticed by Dr. Viraj-PW7. The prosecution had not given any cogent reason as to why the injuries were not found at the previous medical examination. On the other hand, PW2 had suppressed this medical certificate which was obtained from Dr. Viraj PW7 on 15.10.2003 at 11:15pm and it was not produced before the police at the time of lodging the report. PW2 has tried to conceal the said medical certificate from the police. The police registered the case under section 307 IPC at the behest of PW2 and there was no averment of rape in the FIR. The medical evidence as self-contradictory in this case and the first medical shows that there was no injury on the private part of the prosecutrix and as such the medical evidence does not corroborate the testimony of prosecutrix (PW1).

10) It is well settled position of law that if the medical evidence does not support the version of the

prosecutrix, the sole testimony of the prosecutrix can be taken into account and the conviction can be based only on the evidence of the prosecutrix. Now, I have to examine the testimony of the prosecutrix. Learned counsel for the appellant contended that the evidence of prosecutrix is totally unreliable. She was a minor girl and she had been tutored by her maternal uncle. She has given a false statement before the court. It was further contended that the evidence does not inspire confidence. The theory of rape is an afterthought and the theory of rape was not stated in the FIR. Moreover, the theory of rape was not found in the statement recorded under section 161 Cr.P.C. on the next date of incident. This theory was introduced on 18.10.2003 when the statement under section 164 Cr.P.C. was recorded before the Magistrate. Learned A.G.A. refuted the contention. In the light of the respective contentions made above, I have to analyze the evidence of prosecutrix. Perusal of the record reveals that the prosecutrix had stated that when after taking milk she was coming to her house, the appellant met her near the house of Balam Singh. PW2 had stated in his evidence that when the prosecutrix did not return till late hours of night, he inquired from Munna Lal. Munnal Lal told him that the prosecutrix has not taken milk from his shop on the date of incident. As such, the story with regard to taking the milk from Munna Lal is inconsistent. Vimal Kumar (PW5) has stated in his evidence that he saw the girl going with the appellant towards the jungle. PW5 was a chance witness and he had not stated that for what purpose he was present there when his statement was recorded under section 161 Cr.P.C. When he came before the court for the first time he had stated in his evidence that when he

was carrying woods from the jungle, he saw the girl going with the appellant towards jungle. The theory of bringing woods did not find place in the statement recorded under section 161 Cr.P.C. This statement was an after thought in order to show his presence at the spot.

11) It is also pertinent to mention here that Vimal Kumar (PW5) was known to the complainant party. If a girl was going with a person without any reason, it would have been the obvious reaction to ask the prosecutrix or the appellant as to where they were going. He did not ask them and he quickly left the place of incident. The conduct shows that the witness had not acted in a natural course of events. Therefore, the presence of PW5 becomes doubtful.

12) The evidence further reveals that the theory of rape was introduced for the first time on 18.10.2003 when the statement was recorded under section 164 Cr.P.C. If the rape would have been committed and it was in the knowledge of the prosecutrix, it should have been narrated to the police also while her statement was recorded under section 161 Cr.P.C. It is also in the evidence that the uncle and aunt of the prosecutrix were informed about the incident in the morning of 16.10.2003 before taking tea. Meaning thereby, the informant had knowledge of the incident before lodging the FIR and report does not contain the slightest iota to that effect. If it was so, the factum of rape should have been mentioned in the FIR. It is also in the evidence of prosecutrix that the entire story had been narrated to PW2, but there is nothing in the FIR. The evidence of prosecutrix with regard to the rape does not find any place in the statement recorded under section 161 Cr.P.C. Thus, this fact also reveals that

there was continuous development from time to time in the prosecution story. It is also pertinent to mention here that the recovery of the articles from the place of incident were made on the next day i.e. 16.10.2003. According to the I.O., he stared investigation at about 10pm on 16.10.2003. Though, the investigation was handed over to him during the course of the day. It is also in the evidence of prosecutrix (PW1) that she did not visit spot after the incident. The memo of recovery does not contain the signature of the prosecutrix. I.O. had stated that the prosecutrix was present at the spot at the time of preparation of recovery memo. It is also in the evidence that the furd recovery was made on 16.10.2003 at about 9pm which shows that the recovery was prepared before the investigation started by the I.O. The I.O. had stated that the recovery memo was prepared in the light of torch. But when the evidence was adduced before the court, the petromex light was introduced. Vimal Kumar (PW5) has stated that at the time of preparation of recovery memo the petromex and torch was available there. S.I. Ved Pal Tomar (PW6) has stated that he had a petromex and the furd recovery was prepared with the help of petromex. The recovery memo reveals that Furd was prepared in the light of the torch. If the petromex was there, nobody would make the furd in the light of the torch. It is also in the evidence that the prosecutrix did not visit the place of incident, thus, the question arises how the recovery memo was prepared by the I.O. As such, the articles recovered from the spot become doubtful, Thus, the recovery does not corroborate the evidence of the prosecutrix. Kamlesh, who happens to be the grandmother(nani) of the prosecutrix, brought her to hospital where the medical was conducted. If

her grandmother (nani) was there she would definitely narrate the incident to her ‘Nani’ at the first instance. The ‘Nani’ was not produced before the court and she could be the best witness of the incident. The prosecutrix should have told first to her ‘Nani’. The evidence of prosecutrix is not cogent and reliable. Even it is not corroborated by any cogent evidence.

13) In view of the above discussion, I am of the view that the prosecution has not established the guilt beyond any reasonable doubt against the appellant. I find that the learned trial court has erred in convicting and sentencing the appellant. Hence, the appeal is allowed and the conviction and sentence against the appellant awarded by the trial court are set aside. The appellant is acquitted from the charges levelled against him. He is in jail. He shall be released forthwith, if not wanted in any other case. His b ail bonds are cancelled and sureties discharged.

14) Let the lower court record be sent back to the court concerned.

(J.C.S. RAWAT, J.)

Dated 03.03.2006

LSR